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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TODD RICHARD LAVERTY, Defendant and Appellant.	E052332 (Super.Ct.No. BAF006444) OPINION

APPEAL from the Superior Court of Riverside County. J. Richard Couzens, Judge. (Retired judge of the Placer Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Renee B. Rich, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Lilia E. Garcia and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Todd Richard Laverty guilty of second-degree murder.[1] (Pen. Code, § 187, subd. (a).)[2] The jury found true the allegation defendant used a deadly or dangerous weapon during the murder. (§ 12022, subd. (b)(1).) The trial court found true the allegations defendant suffered two prior convictions that resulted in prison terms. (§ 667.5, subd. (b).) The trial court sentenced defendant to prison for an indeterminate term of 15 years to life, and a determinate term of three years.

Defendant raises five contentions on appeal. First, defendant asserts the trial court erred by permitting the prosecutor to impeach defendant with evidence of his prior conviction for child abuse (§ 273a). Second, defendant contends the trial court erred by not instructing the jury that an unintentional killing without malice committed during the course of an inherently dangerous felony constitutes voluntary manslaughter. Third, defendant asserts the weapon enhancement must be reversed because the trial court did not instruct the jury on the requirement of a union of act and intent. Fourth, defendant contends the trial court erred by instructing the jury on how to conduct its deliberations. Fifth, defendant asserts the trial court's various errors came together to create a denial of due process. We affirm the judgment.

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[1] The jury found defendant not guilty of first degree murder. (Pen. Code, § 189.)

[2] All subsequent statutory references will be to the Penal Code unless indicated.

FACTUAL AND PROCEDURAL HISTORY

A. PROSECUTION'S CASE

In 2008, defendant was dating Krystal Smith (Smith). Noel Adamczeski (the victim) grew up with Smith, and was like a brother to her. On December 24, 2008, the victim, the victim's girlfriend, Smith, Smith's daughter, defendant, and three other people—John, Carol, and Randall—were residing in a house and backyard shed in Cabazon.

On December 24, 2008, Smith; defendant; Smith's good friend, Mechell Moncy (Moncy); and the victim were at the house drinking eggnog and rum, and other alcoholic drinks in the kitchen area. Between the four people, they drank a gallon of rum and some beer. John repeatedly came and went from the gathering, but only had one drink. At one point in the evening, Moncy began arguing over the telephone with her child's father. Defendant wanted to leave the gathering and go into a bedroom. Smith told defendant not to leave because everyone was spending time together. Defendant jokingly said, "[Y]ou want to fight so we can go have make-up sex." Defendant stood up, and Smith jokingly pushed him back down. Defendant then playfully put Smith in a chokehold, although the chokehold brought tears to Smith's eyes.

Moncy saw defendant put Smith in a chokehold, dropped the phone, and "started flipping out." Moncy began screaming that defendant was not allowed to disrespect Smith. Moncy "went off" on defendant. Defendant then "started going off" on Moncy.

Smith stood in front of defendant, as Moncy lunged at defendant. Moncy began moving her arms in a windmill fashion, and she struck Smith's nose, which stopped the fight.

At that point, the victim told defendant, "[Y]ou can't talk to my sister like that, and you can't hit my sister." The victim then hit defendant, causing defendant's lip to split and bleed. Defendant went to the bathroom at the back of the house, and the victim went outside. Smith walked with the victim outside in the yard/driveway area, and tried to explain to the victim that defendant did not hit her. The victim picked up a stick, which appeared to be a shovel or rake handle, that was by the door area, but he dropped it before he reached the front yard area.

Approximately one minute later, defendant came outside. Defendant yelled that the victim "sucker-punched" him. The victim told defendant that defendant disrespected Smith. Smith kept reminding the two men that they had to share Christmas dinner the next day, and live together; Smith asked the men to "knock it off." Smith stood between the two men, and was being pushed as she tried to stay in between them, because the victim was backing away as defendant moved towards the victim. The victim did not have the stick and was not using it to threaten defendant.

As defendant lunged at the victim, the victim continued ducking and moving backwards. After a couple of minutes, Smith said, "[F]uck it. If you guys are going to fight, fight." Smith stepped out of the way. Defendant struck the victim's chest. It appeared to Smith that defendant punched the victim's chest.

The victim walked away down the street, holding his chest, saying "[D]on't ever talk to me again, stay away from me . . . we can't hang out no more." The victim walked a few houses away, but then walked back. The victim said, "[T]ell [Moncy] to take me to the hospital." The victim explained that he was "choking on blood." Defendant said to Smith, "[W]ell, you'd better tell [Moncy to] take him to the hospital, I stabbed him."

Smith and the victim went inside the house. Moncy called 911. The victim sat on a couch, but continued bleeding and slipped off the couch. The victim said he was choking on blood, could not breathe, and was dying. The victim had blood coming from his mouth. Defendant stayed outside. A few minutes after going inside, Smith went back outside to ask defendant, "[W]hat the hell[?]" but defendant had left.

Riverside County Sheriff's Detective Jason Corey found blood inside the house—in the kitchen, "all down through the hallway," in the hallway bathroom, in the master bathroom, and the living room. Detective Corey found knives in the kitchen. Outside the house, it had been raining heavily, but Detective Corey found possible blood in the street, the gravel area in front of the house, and on the walkway between the door and the driveway. Detective Corey found a knife in the front yard of the house to the north of Smith's, defendant's, and the victim's house. The blade of the knife was six inches long. Detective Corey also found three sticks in the yard. Detective Corey found a 30.5-inch tree branch outside the gate; a "four-by-four" length of fence post, in the front yard; and a 29-inch piece of a shovel handle in the yard.

Riverside County Sheriff's Investigator Gary Bowen was called out to the house following the stabbing, and interviewed Smith. Smith was intoxicated during the interview and not cooperative. During the interview, Smith did not mention the victim holding a stick during the altercation. Investigator Bowen first heard about the victim holding a stick during defendant's trial. Smith told the investigator that the victim had been running, dodging, and trying to hide from defendant when they were in the yard together.

The victim's autopsy revealed a stab wound half an inch in length, in the left upper part of his chest. The wound went through a portion of the left second rib, fracturing the rib, and 2.5 inches into the upper lobe of the left lung. The total depth of the wound was three to 3.5 inches. The direction of the wound path was consistent with a downward strike. A four-inch knife blade would have been consistent with the cause of the stab wound. The cause of the victim's death was a stab wound to the chest.

B. PRETRIAL MOTIONS

Prior to trial, the People argued defendant's prior felony convictions should be admissible for impeachment purposes. Defendant's prior convictions consisted of (1) child abuse (§ 273a, subd. (a)), on November 7, 2000, in San Bernardino County; and (2) grand theft (§ 487, subd. (a)), on March 5, 2005, in San Bernardino County. The People asserted both prior convictions were crimes involving moral turpitude.

At a pretrial hearing, the trial court addressed the People's argument. The court asked if defendant had any argument to offer on the issue. Defendant's trial counsel responded, "No." The trial court found both prior convictions were crimes of moral

turpitude and it would not be prejudicial to introduce the prior convictions since they were not remote in time and were substantially different than the charged offense. The trial court ruled the prior convictions could be admitted as impeachment evidence if defendant testified.

C. DEFENSE

Defendant testified at trial. Defendant said he was drinking beer and rum the night of the stabbing. Defendant admitted stabbing the victim. Defendant described arguing with Moncy, and being punched by the victim. After being punched, defendant went to the bathroom to see how badly his lip was injured. When defendant left the bathroom, he was angry, and went to find the victim. Defendant intended to fight the victim. Someone in the house told defendant the victim was outside, so he went outside.

Defendant found the victim hiding behind a bush. Defendant asked the victim, "[W]hy'd you hit me?" The victim responded, "[Y]ou shouldn't hit my sister." Defendant did not see anything in the victim's hands when they were talking to one another; however, defendant thought he heard defendant banging a piece of wood against the concrete. Defendant thought the victim "was going to try to take [him] out," by hitting him. The victim, while standing up, swung at defendant as if holding a baseball bat, defendant believed the victim was swinging a piece of wood at him. Defendant ducked, and was not struck, but he was scared. Defendant immediately took a knife from his back pocket and stabbed the victim one time in the chest. Defendant did not see anything in the victim's hands immediately after the stabbing.

After stabbing the victim, defendant removed the knife from the victim's chest, and the victim backed away. Defendant believed the victim did not know he had been stabbed. The victim jumped over a fence and ran away. Defendant threw the knife in the neighbor's front yard. The knife law enforcement found in the yard was the knife defendant used to stab the victim. Defendant had been carrying the knife in his back pocket because he did not want Smith's daughter to find it in the house and be injured by it.

When the victim returned, he was coughing and blood was coming out of his mouth. Defendant said to the victim, "[S]hit, you know, I—I fucked up. Get in [Smith's] van. I'm going to take you to the hospital." Defendant told Smith he stabbed the victim. The victim refused to accept a ride from defendant, so defendant left. Defendant left because he was scared of what he had done.

Defendant was arrested five or six hours after the stabbing. Defendant admitted lying to Investigator Bowen more than once. Defendant told the investigator he had a fight with the victim, but the victim left before defendant could harm him. Defendant told the investigator, "'[T]hat dude has enemies,'" and that he "'didn't do nothing to that dude,'" referring to the victim.

While testifying, defendant admitted suffering the prior child abuse and grand theft convictions. The examination related to the prior offenses went as follows:

"[Prosecutor]: Now, you were convicted of two counts of Penal Code Section 273a(a) on November 7, 2000 correct?

"[Defendant]: Yes.

"[Prosecutor]: Is that in San Bernardino County?

"[Defendant]: Yes.

"[Prosecutor]: That's felony child abuse, right?

"[Defendant]: Yes.

"[Prosecutor]: You were also convicted of a violation of Penal Code Section 487(a) on March 7, 2005?

"[Defendant]: That was grand theft?

"[Prosecutor]: Yes.

"[Defendant]: Yes.

"[Prosecutor]: San Bernardino County?

"[Defendant]: Yes.

"[Prosecutor]: So you have a couple [of] prior felony convictions; right?

"[Defendant]: That's correct."

The facts related to the jury instructions will be given *post*.

DISCUSSION

A. PRIOR CONVICTIONS

Defendant contends, (1) the trial court erred by permitting the prosecutor to impeach defendant with evidence of his prior conviction for child abuse (§ 273a); (2) the prosecutor committed misconduct; and (3) his own trial counsel was ineffective for not objecting to the impeachment evidence. The People (1) agree the trial court erred; (2) assert defendant forfeited his contentions related to the trial court's error and the prosecutor's error; and (3) contend defendant has not shown he suffered prejudice as

a result of his trial counsel not objecting to the impeachment evidence. We agree with the People.

1. *MORAL TURPITUDE*

The People and defendant agree child abuse (§ 273a) does not constitute a crime of moral turpitude. In *People v. Sanders* (1992) 10 Cal.App.4th 1268, 1275, the Fifth District Court of Appeal concluded a violation of section 273a does not qualify as a crime of moral turpitude because the offense can be committed by "wholly passive conduct"; for example, extreme neglect. (*Sanders*, at pp. 1274-1275.) The appellate court was "not aware of any decision finding a crime is one of moral turpitude when the conviction can result from passive conduct unaccompanied by criminal intent." (*Id.* at p. 1274.)

"Whether a particular offense involves moral turpitude must be determined based on the statutory elements of the crime. The court may not consider the specific facts giving rise to the conviction but must conclude that each element of the crime, including the minimum statutory elements, involves moral turpitude. [Citation.]" (*People v. Robinson* (2011) 199 Cal.App.4th 707, 712.) This is known as the "'least adjudicated elements test.'" (*Ibid.*) Given the foregoing law, we will assume, without deciding, that the parties are correct—a violation of section 273a is not a crime of moral turpitude.

2. *TRIAL COURT'S ERROR*

Defendant contends the trial court erred by permitting the prosecutor to impeach defendant with evidence of his child abuse conviction (§ 273a). The People agree the trial court erred, but assert the error was forfeited.

In order to preserve an evidentiary issue for appeal, an objection must be raised in the trial court. (Evid. Code, § 353; *People v. Wheeler* (1992) 4 Cal.4th 284, 300.) During the motions in limine, the trial court asked defendant's counsel if he had any argument to offer related to the prosecutor's motion to introduce defendant's child abuse conviction as impeachment evidence. Defendant's trial counsel responded, "No." When the prosecutor asked defendant about the convictions during trial, defendant's counsel did not raise an objection. Due to the failure to object to the impeachment evidence, the issue has not been preserved for appeal. Accordingly, we do not address the merits of defendant's contention.

3. *PROSECUTORIAL MISCONDUCT*

Defendant contends the prosecutor committed misconduct by (1) misleading the trial court about the admissibility of defendant's prior conviction for child abuse (§ 273a), in that the prosecutor had an ethical duty to inform the trial court that child abuse is not a crime of moral turpitude; and (2) stating defendant was convicted of two counts of child abuse, when there is evidence of only one child abuse conviction. The People contend defendant waived this contention by not objecting in the trial court.

"'A defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety.' [Citation.]" (*People v. Lopez* (2008) 42 Cal.4th 960, 966.) When the prosecutor moved in limine for permission to introduce the child abuse conviction, defendant's trial counsel did not object. During trial, when the prosecutor asked defendant if he suffered

two prior child abuse convictions, defendant's trial counsel did not object. In the prosecutor's closing argument, when she said, "[T]he defendant admitted that he had been convicted of a couple of felonies when he was on the stand," defendant's trial counsel did not object. Given defendant's failure to object to the alleged acts of misconduct, we conclude the prosecutorial misconduct issue was not preserved for appeal. Accordingly, we do not address the merits of defendant's contention.

4. *INEFFECTIVE ASSISTANCE OF COUNSEL*

Defendant contends his trial counsel rendered ineffective assistance of counsel by failing to object to the prosecutor (1) impeaching defendant with the prior child abuse conviction; and (2) misstating defendant suffered two prior child abuse convictions, when he only suffered one.

"A defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel's inaction violated the defendant's constitutional right to the effective assistance of counsel." (*People v. Lopez, supra,* 42 Cal.4th at p. 966.) "To demonstrate ineffective assistance of counsel, a defendant must show that counsel's action was, objectively considered, both deficient under prevailing professional norms and prejudicial. [Citation.] To establish prejudice, a defendant must show a reasonable probability that, but for counsel's failings, the result of the proceeding would have been more favorable to the defendant. [Citation.]" (*People v. Burgener* (2003) 29 Cal.4th 833, 880.)

We start our analysis with the prejudice prong. Defendant admitted stabbing the victim. Defendant argued (1) he was not guilty because he was acting in self-defense;

(2) at most he was guilty of voluntary manslaughter based upon a theory of imperfect self-defense; and (3) the evidence did not support a finding of premeditation. The jury acquitted defendant of first degree murder, but found defendant guilty of second degree murder.

When defendant testified at trial, the story he gave was as follows: The victim punched defendant's mouth, while they were in a hallway near the living room. Defendant went to the bathroom, and then "went to look for [the victim]" because defendant "was angry." Defendant found the victim standing up, hiding behind a bush outside. Defendant intended to fight the victim. Defendant thought he heard wood banging on concrete, but did not see anything in the victim's hands.

The victim appeared "[a]ngry, confused" to defendant. Smith placed herself between the two men. Defendant and the victim yelled at one another for a "couple of minutes," while Smith was between them. Defendant believed the victim swung at him, while holding an object, although defendant never saw the object, and defendant was not struck. Defendant immediately stabbed the victim. Defendant did not see an object in the victim's hands following the stabbing.

When Smith testified, she recounted seeing the victim backing away from defendant and dodging defendant's lunges. Smith did not see the victim (1) holding an object while in the front yard, (2) raising an object at defendant, (3) swinging an object at defendant, or (4) threatening defendant in any way. Thus, evidence reflects no one saw an object in the victim's hands, and defendant stabbed the victim with a knife.

Given the evidence, it appears the jury rejected defendant's testimony that he feared for his safety, which is reasonable given that defendant searched for the victim after the two separated following the initial punch. Defendant brought a knife with him and used it, despite the victim never having physical contact with defendant once they were in the yard. Thus, the evidence supporting a murder finding was quite strong: it appears defendant was not acting in self-defense, since he searched for the victim, in order to fight him; was not harmed by the victim while in the yard; and there was evidence the victim was consistently backing away from defendant.

Moreover, while the murder evidence against defendant was strong, the prosecutor did not belabor the impeachment evidence. The prosecutor asked defendant if he suffered the prior convictions, and when and where the convictions occurred. The facts related to the prior crimes were not discussed. Additionally, the prosecutor went through defendant's various lies to law enforcement in extreme detail. Initially, defendant said he lied to law enforcement less than 10 times. The prosecutor then went through defendant's various statements in detail, and asked if they were lies. Given the variety of lies told by defendant, and the properly admitted prior grand theft conviction, it is unlikely that the jury would have found defendant's testimony more believable if his trial counsel had objected to the child abuse information. Accordingly, due to the strong evidence supporting the murder finding, and the variety of evidence calling defendant's credibility into question, we conclude there is not a reasonable probability that, but for counsel's alleged failings, the result of the proceeding would have been more favorable to defendant.

B. VOLUNTARY MANSLAUGHTER INSTRUCTION

Defendant contends the trial court erred by not sua sponte instructing the jury on voluntary manslaughter being a lesser included offense of murder, when the killing is committed without malice during the commission of an inherently dangerous felony.[3] We disagree.

"It is well established that even in the absence of a request, the trial court has a sua sponte duty to instruct on lesser included offenses when there is substantial evidence the defendant is guilty only of the lesser offense." (*People v. Cook* (2001) 91 Cal.App.4th 910, 917.) We apply the de novo standard of review when analyzing whether the trial court should have given a lesser included offense instruction. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.)

Defendant's theory of a killing being voluntary manslaughter when it is committed without malice during the commission of an inherently dangerous felony is based upon *People v. Bryant* (2011) 198 Cal.App.4th 134 (*Bryant*). Our Supreme Court granted review of *Bryant* and depublished the intermediate appellate court's opinion, after defendant submitted his opening brief. (*People v. Bryant*, review granted Nov. 16, 2011, S196365.) The Supreme Court granted review for the purpose of determining whether voluntary manslaughter may be premised on a killing without malice, which occurs during the commission of an inherently dangerous assaultive felony. (*Ibid.*)

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[3] The trial court did instruct the jury on heat of passion voluntary manslaughter.

In defendant's reply brief, he concedes *Bryant* has been depublished, and the issue is being reviewed by the Supreme Court. However, defendant relies on another case, *People v. Garcia* (2008) 162 Cal.App.4th 18, 31, in which the appellate court wrote, "[A]n unlawful killing during the commission of an inherently dangerous felony, even if unintentional, is at least voluntary manslaughter"—as opposed to involuntary manslaughter.

The People assert *Garcia* did not create a new theory of voluntary manslaughter; rather, the court concluded a killing during the commission of an inherently dangerous felony was not involuntary manslaughter, such that the trial court in *Garcia* did not err by not instructing the jury on involuntary manslaughter. The People further contend there is no legal basis for a voluntary manslaughter finding being premised on an unlawful killing, without malice, being committing during the commission of an inherently dangerous felony, because the Legislature would have defined the crime in a statute.

For the sake of efficiency, we will assume, without deciding, that the law supports a finding of voluntary manslaughter where the killing is committed without malice during the commission of an inherently dangerous felony. Accordingly, we examine whether there is substantial evidence defendant is guilty only of the lesser offense.

In this case defendant committed one felonious act—stabbing the victim. The stabbing was not secondary to a primary felony that was being committed at the time of the killing—there was only a stabbing. Thus, there is not substantial evidence the

killing occurred during the commission of an inherently dangerous felony, because there was not evidence of a secondary felony. As a result, the trial court did not err by not instructing the jury on the offense of voluntary manslaughter where the killing is committed without malice during the commission of an inherently dangerous felony.

Defendant asserts he did not intend to kill the victim when he stabbed him, he only intended to batter the victim. Therefore, defendant contends the killing was committed during the course of an assaultive felony, wherein defendant did not appreciate the stabbing would result in the victim's death. Defendant's argument is not persuasive, because he is essentially arguing that the killing was involuntary manslaughter, not voluntary manslaughter.

"'Second degree murder based on implied malice is committed when the defendant does not intend to kill, but engages in conduct which endangers the life of another, and acts deliberately with conscious disregard for life. [Citation.] An essential distinction between second degree murder based on implied malice and involuntary manslaughter based on criminal negligence, is that in the former the defendant subjectively realized the risk to human life created by his conduct, whereas in the latter the defendant's conduct objectively endangered life, but he did not subjectively realize the risk. [Citations.]' [Citation.]" (*People v. Klvana* (1992) 11 Cal.App.4th 1679, 1704.) Defendant's argument is implying he did not appreciate that stabbing a person in the upper left portion of the chest could result in death, which coincides with a theory of involuntary manslaughter, as opposed to voluntary manslaughter. Since defendant's argument appears to relate more to involuntary manslaughter than voluntary

manslaughter, we are not persuaded the trial court erred by not instructing on voluntary manslaughter as it relates to a killing committed without malice during the commission of an inherently dangerous felony.

Moreover, defendant's theory that he did not intend to kill the victim when he stabbed him—he only intended to batter the victim—is problematic due to the merger doctrine. The merger doctrine provides that when an assault results in murder, the assault merges into the murder, such that the assault cannot provide the basis for a felony murder conviction. (*People v. Sanders* (2003) 111 Cal.App.4th 1371, 1374.) Defendant's argument is encouraging this court to look at the singular act of stabbing as two separate acts—an assault or battery that resulted in a killing. Under the merger doctrine this is problematic, because there is a singular act—a single stabbing. To the extent an assault or battery was part of the stabbing, it would merge into the killing, so we are left with one act. Thus, there is not substantial evidence of the killing occurring during the course of an inherently dangerous felony—there is only a killing.

C. WEAPON ENHANCEMENT

Defendant contends the true finding related to the weapon enhancement (§ 12022, subd. (b)(1)) must be reversed because the trial court did not instruct the jury on the requirement of finding a union of act and intent as it related to the enhancement. (CALCRIM No. 252.) The People assert a reasonable juror would have concluded from

the instructions that a union of act and intent was required for the enhancement. We find no error.[4]

"'Errors in jury instructions are questions of law, which we review de novo.' [Citation.]" (*People v. Fenderson* (2010) 188 Cal.App.4th 625, 642.) Defendant's argument relies on section 20, which provides, "To constitute [a] crime there must be unity of act and intent. In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." Former section 12022, subdivision (b)(1), provided, "Any person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, unless use of a deadly or dangerous weapon is an element of that offense." (Eff. Jan. 1 2005, to Sept. 30, 2011.)

In *People v. Poroj* (2010) 190 Cal.App.4th 165, 172-173 [Fourth Dist., Div. Two], this court explained that the enhancement in section 12022.7, which provides for an increased sentence if great bodily injury is inflicted during the commission of a felony, "does not define a crime or public offense. Rather, it is typical of many sentencing enhancement statutes that 'do not purport to define a criminal offense but simply relate to the penalty to be imposed under certain circumstances.' [Citation.]"

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[4] The People contend defendant forfeited this error by not objecting to the allegedly incomplete instruction at the trial court. "'Failure to object to [an] instructional error forfeits the issue on appeal unless the error affects [the] defendant's substantial rights. [Citations.]'" (*People v. Battle* (2011) 198 Cal.App.4th 50, 64-65; see also § 1259.) We choose to address the merits of defendant's contention because the issue is easily resolved.

This court further explained, that "section 12022.7, subdivision (a) is not required to contain, and by its terms does not contain, an intent element in addition to the general or specific intent element of the underlying felony or attempted felony to which it applies. 'This is permissible because [the statute] do[es] not criminalize otherwise innocent activity, since [it] incorporate[s] the underlying crime[], which already contain[s] a mens rea requirement. [Citation.]' [Citation.]" (*People v. Poroj*, *supra*, 190 Cal.App.4th at p. 173.)

Former section 12022, subdivision (b)(1), is similar to section 12022.7, in that it punishes a person for "personally us[ing] a deadly or dangerous weapon in the commission of a felony or attempted felony," which incorporates the underlying crime into the enhancement. (See *People v. Overton* (1994) 28 Cal.App.4th 1497, 1503 [there is no scienter requirement for section 12022, subdivision (a)(1)].) The trial court instructed the jury on the union of act and intent as it related to the murder charge, but not the enhancement. Since the enhancement is incorporated into the murder charge, the trial court did not err by instructing the jury on the union of act and intent as it relates to the murder, but not the weapon enhancement.

Nevertheless, to the extent the enhancement could be found to have its own general intent requirement, separate and apart from the underlying crime, we conclude no reasonable juror would have understood the instructions to not require such a union. (See *People v. Wardell* (2008) 162 Cal.App.4th 1484, 1494 [Enhancements have general intent requirements if a specific intent is not included in the definition of the crime.].)

“‘“‘“‘In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.’ [Citation.]” [Citation.]’ [Citation.] ‘“Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.” [Citation.]’ [Citation.]” (*People v. Riley* (2010) 185 Cal.App.4th 754, 767.)

The trial court informed the jury: “The crime charged in Count 1 requires proof of the union, or joint operation, of act and wrongful intent.” (CALCRIM No. 252.) The trial court explained murder is a specific intent crime, and in order to find a person guilty of murder “that person must not only intentionally commit the prohibited act, but must do so with a specific intent or mental state.” In the enhancement instruction, the trial court informed the jury: “Someone personally uses a deadly or dangerous weapon if he or she *intentionally* does any of the following: [¶] 1. Displays the weapon in a menacing manner; [¶] OR [¶] 2. Hits someone with the weapon.” (CALCRIM No. 3145, italics added.)

Given that the trial court explained the union of act and intent to the jurors, and it instructed the jury defendant must have *intentionally* displayed the weapon or struck the victim with the weapon, the instructions considered as a whole could only be interpreted as requiring defendant to have acted while having the required general intent. Thus, we conclude when the instructions are considered as whole, there was no error.

D. DELIBERATIONS

1. *FACTS*

The trial court gave the jury the following instruction: "If all of you find that the defendant is not guilty of a greater charged crime, you may find him guilty of a lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime. A defendant may not convicted of both a greater and lesser crime for the same conduct. Voluntary manslaughter is a lesser crime to the crime of murder. [¶] It is up to you to decide the order in which you consider each crime and the relevant evidence, but I can accept a verdict of guilty of a lesser crime only if you have found the defendant not guilty of the corresponding greater crime. [¶] The verdict form contains a series of instruction[s] on how you are to vote on the question of guilt or innocence of the greater and lesser crimes. Please follow the instructions carefully and only proceed in the order of questions as presented on the verdict form." (CALCRIM No. 3518 [modified by the trial court].)

The trial court then elaborated on the foregoing instruction. The trial court told the jurors: "And I want to touch on that a little bit more. This is the verdict form. It's a single form for all of the issues that you have to decide in this case. It contains three parts, part A, B, and C.

"As indicated in the instructions, you can deliberate and discuss the facts in any order that you want, but when it gets down to voting, you have to follow a prescribed order. It's critical. And this verdict form lays out that order. You start at the first, and you work through it. Do not start at the back and work up. You start at the top and

work through the document in that order. And you—it's sort of like a tax form in the sense that if you answer a certain question one way, it will tell you where to go. If you answer it another way, it may tell you a different place to go. So how you proceed through the actual verdict form will depend on what your vote is on the question[s] as you go through it.

"So the way this is set up, part A deals with first-degree murder. And the form will instruct you, if you find him guilty of first-degree murder, then you indicate that. And you also are then directed to answer a question that is, did the defendant personally use a deadly or dangerous weapon.

"If you—the form will also tell you if you find him not guilty of first-degree murder, then you go on to part B, which deals with second-degree murder. But if you can't agree on whether it's first- or second-degree murder, you sign nothing. You have not reached an agreement. You all have to agree unanimously that he is not guilty of murder in the first degree before you may move to the question of is he guilty of second-degree murder. [¶] Understand?

"And likewise, onto voluntary manslaughter. So again, follow the instructions on the form meticulously. That will tell you the specific order in which you need to vote."

2. *DISCUSSION*

Defendant contends the trial court erred by instructing the jury that it could not consider the lesser offenses unless it unanimously agreed to acquit defendant of the greater offenses. We disagree.

As set forth *ante*, "'[e]rrors in jury instructions are questions of law, which we review de novo.' [Citation.]" (*People v. Fenderson*, *supra*, 188 Cal.App.4th at p. 642.) Our Supreme Court has set forth the following rule: "[T]he jury may deliberate on the greater and lesser included offenses in whatever order it chooses, but . . . it must acquit the defendant of the greater offense before returning a verdict on the lesser offense. [Citation.] In this manner, when the jury renders its verdict on the lesser included offense, it will also have expressly determined that the accused is not guilty of the greater offense. [¶] The acquittal-first rule, requiring the jury to expressly acquit the defendant before rendering a verdict on the lesser offense, serves the interests of both defendants and prosecutors [citations], and we encourage trial courts to continue the practice of giving the [acquittal-first] instruction . . . ." (*People v. Fields* (1996) 13 Cal.4th 289, 309.)

The trial court's instructions conformed to the foregoing rule. The trial court repeated to the jury that it could deliberate in whatever order it chose, but to start with the greatest offense when completing the verdict forms, so as to obtain express acquittals on the greater charges. For example, the trial court instructed the jurors: "It is up to you to decide the order in which you consider each crime and the relevant evidence, but I can accept a verdict of guilty of a lesser crime only if you have found the defendant not guilty of the corresponding greater crime." (CALCRIM No. 3518 [modified version].) The trial court then again told the jury, "As indicated in the instructions, you can deliberate and discuss the facts in any order that you want, but when it gets down to voting, you have to follow a prescribed order." The trial court's

instructions accurately reflect our Supreme Court's ruling in *People v. Fields*, *supra*. Thus, we conclude the trial court did not err.

Defendant points out the bench notes for CALCRIM No. 3518 direct trial courts to not use CALCRIM No. 3518 in homicide cases. The bench notes instruct trial courts to use CALCRIM Nos. 640 through 643 in homicide cases. While we agree that the bench notes instruct trial courts to not use CALCRIM No. 3518 in homicide cases, the trial court modified CALCRIM No. 3518, and it appears to be an accurate reflection of the law. Thus, we are not persuaded the trial court erred by using a modified version of CALCRIM No. 3518, as opposed to CALCRIM Nos. 640 through 643.

Next, defendant contends the trial court improperly instructed the "jurors on how they must proceed with their deliberations." Defendant asserts the trial court instructed the jury that it "could not even consider voluntary manslaughter unless [it] first unanimously acquitted [defendant] of first and second degree murder." Defendant's interpretation of the trial court's instructions is not reasonable. The trial court twice told the jurors that it could deliberate in any order they saw fit. Thus, the jurors could consider voluntary manslaughter from the beginning it they so chose. The trial court explained a particular order only needed to be followed when completing the verdict forms. The trial court's instructions were clear and proper both times the court explained the process. Thus, we are not persuaded by defendant's argument.

E. CUMULATIVE ERROR

Defendant asserts the foregoing evidentiary and instructional errors came together to create a denial of due process. As to defendant's instructional contentions,

we have concluded the trial court did not err. In regard to defendant's evidentiary contention, we have concluded the assumed error was not prejudicial. Defendant's claims are not more persuasive when grouped together. Thus, we conclude defendant did not suffer a denial of due process as a result of the cumulative impact of the alleged errors. (See *People v. Garcia* (2011) 52 Cal.4th 706, 764-765 [similar conclusion].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.